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11 Oversee.net and
12 SnapNames.com, Inc.

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA

15 STEWART RESMER, an individual, on
16 behalf of himself and all others similarly
17 situated,

18 Plaintiff,

19 v.

20 OVERSEE.NET, INC., a California
21 corporation, and SNAPNAMES.COM,
22 INC., an Oregon corporation,

23 Defendants.
24
25
26
27
28

Case No.: CV09-8497-MMM-VBKx

**DEFENDANTS' MOTION TO
DISMISS PURSUANT TO FEDERAL
RULE OF CIVIL PROCEDURE
12(B)(6)**

Hearing Date: March 15, 2010

Time: 10:00 a.m.

Judge: Hon. Margaret M. Morrow

Location: Courtroom 780

1 TO THIS HONORABLE COURT, PLAINTIFF AND ITS ATTORNEYS OF
2 RECORD:

3 PLEASE TAKE NOTICE THAT, on Monday, March 15, 2010, at 10:00 a.m., or
4 as soon thereafter as this matter may be heard, in Courtroom 780 of the United States
5 District Court for the Central District of California, located at 255 East Temple Street,
6 Los Angeles, California, before the Honorable Margaret M. Morrow, pursuant to Fed.
7 R. Civ. P. 12(b)(6), SnapNames.com, Inc. ("SnapNames") and Oversee.net
8 ("Oversee") (collectively, "Defendants") move this Court to dismiss claims against
9 them because the Complaint of plaintiff Stewart Resmer ("Plaintiff") lacks sufficient
10 facts upon which a legal claim can be stated.

11 The basis for this Motion is as follows: (1) Plaintiff fails to state a claim under
12 the California Auction Act because, by its terms, the Act does not apply to Defendant's
13 alleged conduct; (2) Plaintiff fails to state a claim for breach of fiduciary duty because
14 Plaintiff has failed to plead facts sufficient to allege any fiduciary duty; (3) Plaintiff
15 fails to state a claim for both statutory and common law fraudulent concealment
16 because Plaintiff has failed to plead facts sufficient to allege any duty to disclose; (4)
17 Plaintiff fails to state a claim under California Business & Professions Code section
18 17200 for alleged "unlawful, unfair, and/or fraudulent business practices" to the extent
19 the claim purports to be predicated upon statutory violations and concealment, which
20 Plaintiff has failed to adequately allege; (5) all of Plaintiff's claims against Oversee.net
21 fail because he lacks Article III standing to pursue them.

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1 This Motion is supported by the attached Memorandum of Points and
2 Authorities, the records and papers on file in this action, such matters of which this
3 Court may take judicial notice, and upon such other evidence and oral argument as may
4 be considered by this Court before or at the hearing on this Motion.

5 Counsel for Plaintiff and Defendants met and conferred on January 4, 2010
6 regarding the present motion pursuant to Local Rule 7-3 but no agreement could be
7 reached regarding the present motion.

8
9 Dated: January 11, 2010

WILLENKEN WILSON LOH & LIEB LLP

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11
12 By: s/William A. Delgado

13 William A. Delgado
14 Attorneys for Defendants
15 Oversee.net and
16 SnapNames.com, Inc.
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(4) Plaintiff fails to state a claim for violation of California Business & Professions Code section 17200 to the extent the claim purports to be predicated upon statutory violations and a concealment that Plaintiff has failed to adequately allege.

For these reasons, all of Plaintiff's claims against Oversee should be dismissed. Plaintiff's claims against both Defendants for violation of the California Auction Act, breach of fiduciary duty, and statutory and common law concealment likewise should be dismissed in their entirety. And, Plaintiff's Section 17200 claim should be dismissed to the extent it is predicated upon statutory violations and a concealment that Plaintiff has failed to adequately allege. Defendants thus respectfully request that this Court grant their Motion to Dismiss pursuant to Federal Civil Procedure Rule 12(b)(6).

Statement of Relevant Facts

As a general matter, SnapNames conducts online auctions on the Internet to sell domain names.¹ Complaint, ¶¶ 12, 18. From 2005-2009, an employee of SnapNames, through an alias, bid in a number of those auctions, thereby allegedly "artificially raising sale prices" in those auctions. *Id.*, ¶¶ 19, 20. In November 2009 SnapNames voluntarily disclosed that one of its employees had bid in certain auctions through an alias and offered to compensate certain affected bidders. *Id.*, ¶ 24.

Here, Plaintiff participated in a SnapNames auction on July 21, 2006. *Id.*, ¶ 26. He won the auction by submitting a winning bid for a domain name. *Id.*, ¶¶ 28, 29.

¹ "The location of individual sites on the internet is denoted by an internet protocol ('IP') address composed of a string of four groups of digits separated by periods. Each site has a unique numeric internet address. For ease of access, the numeric addresses typically correspond to more easily remembered alphanumeric 'domain names' (such as <google.com>), which internet users can enter in their web browser to access specific sites." *Sold Host v. Namecheap, Inc.*, 2009 WL 2225726 at * 1 (C.D. Cal.) (internal citations omitted).

1 However, the SnapNames employee participated in that auction, and, as a result,
 2 Plaintiff “overpaid” by \$20 for a domain name. *Id.*, ¶¶ 27, 31.

3 Notably, though, Plaintiff admits that Oversee did not acquire SnapNames until
 4 2007. *Id.*, ¶ 11.

5 In November 2009, Plaintiff filed a putative class action against SnapNames and
 6 Oversee, purporting to allege claims for breach of fiduciary duty, restitution/unjust
 7 enrichment, common law fraudulent concealment, statutory fraudulent concealment
 8 (California Civil Code sections 1572, 1573, 1709, 1710), and for violations of the
 9 California Auction Act (California Civil Code section 1812.601 *et seq.*) and California
 10 Business & Professions Code section 17200.

11 Argument

12 I. THE STANDARD FOR A RULE 12(B)(6) MOTION.

13
 14 Under Federal Civil Procedure Rule 12(b)(6), dismissal is proper where there is
 15 an absence of sufficient facts to support a cognizable legal theory. *Navarro v. Block*,
 16 250 F. 3d 729, 732 (9th Cir. 2001); *see* Fed. R. Civ. P. 12(b)(6). When considering a
 17 motion to dismiss under Rule 12(b)(6), the court typically must “accept all allegations
 18 of fact in the complaint as true and construe them in the light most favorable to the
 19 plaintiff.” *Matoff v. Brinker Restaurant Corp.*, 439 F. Supp. 2d 1035, 1037 (C.D. Cal.
 20 2006) (quoting *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir.
 21 2003)). However, conclusory allegations of law, unwarranted deductions of fact, and
 22 unreasonable inferences are insufficient to defeat a motion to dismiss. *Sprowell v.*
 23 *Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001); *Ashcroft v. Iqbal*, ___ U.S.
 24 ___, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868, __ (2009) (“[W]here the well-pleaded
 25 facts do not permit the court to infer more than the mere possibility of misconduct, the
 26 complaint has alleged—but it has not ‘show[n]’-‘that the pleader is entitled to relief.’”) *citing*
 27 Fed. R. Civ. P. 8(a)(2).
 28

II. PLAINTIFF HAS FAILED TO ALLEGE FACTS SUFFICIENT TO STATE CERTAIN CLAIMS.

A. Plaintiff Does Not Have Standing to Assert *Any* Claims Against Overseer.

Plaintiff purports to allege claims against Overseer, but such claims fail as a matter of law because Plaintiff does not meet a jurisdictional prerequisite to its assertion: standing.

All of Plaintiff's claims are based upon an alleged transaction with SnapNames on July 21, 2006. Complaint, ¶ 26. But, Plaintiff also admits in his Complaint that SnapNames was not acquired by Overseer until 2007. *Id.*, ¶ 11. Plaintiff offers no allegations linking Overseer to his alleged injury purportedly stemming from the transaction in 2006. Plaintiff thus lacks Article III standing to sue Overseer.

"To establish Article III standing, a plaintiff must demonstrate: '(1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) **the injury is fairly traceable to the challenged action of the defendant**; and (3) it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision.'" *Siemers v. Wells Fargo & Co.* 2006 WL 3041090 (N.D. Cal.) at *5 (emphasis added) (quoting *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servcs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000)); accord *Cady v. Anthem Blue Cross Life and Health Ins. Co.*, 583 F. Supp. 2d 1102, 1105 (N.D. Cal. 2008). "Accordingly, if a plaintiff cannot trace an injury to a defendant, the plaintiff lacks standing with regard to that defendant." *Siemers v. Wells Fargo & Co.* 2006 WL 3041090 (N.D. Cal.) at *5.

Put simply, where a complaint does not allege that a plaintiff's alleged injury is traceable to a particular defendant, a motion to dismiss as to that defendant must be granted. *Id.* at *6 (dismissing complaint of putative class representative who could not allege the conduct of a particular defendant caused his injury). Accordingly, because

1 Plaintiff does not allege any link between his alleged injury in 2006 and Oversee,
2 which acquired SnapNames in 2007, Plaintiff's claims against Oversee must be
3 dismissed.

4 Nor does the fact that Plaintiff purports to allege claims on behalf of a class
5 confer standing upon him. A "plaintiff who lacks Article III standing to sue a
6 defendant may not establish standing 'through the back door of a class action.'" *Henry*
7 *v. Circus Circus Casinos, Inc.*, 223 F.R.D. 541, 544 (D. Nev. 2004) (quoting *Allee v.*
8 *Medrano*, 417 U.S. 802, 828-829 (1974)). "Standing is one of the keys necessary to
9 open the door to the federal courthouse. Rule 23 merely provides a procedural
10 doorstep which holds the door open for qualified class members, once it has been
11 opened by the person or persons initially seeking entry." *Id.* at 544 (quotation marks
12 and citations omitted). Thus, "to establish Article III standing in a class action, at least
13 one named plaintiff must have standing in his own right to assert a claim against each
14 named defendant before he may purport to represent a class claim against that
15 defendant." *Id.* (dismissing claims against defendants other than the one against whom
16 plaintiff could establish standing); accord *Cady v. Anthem Blue Cross Life and Health*
17 *Ins. Co.*, 583 F. Supp. 2d at 1106 (same); *In re Western States Wholesale Natural Gas*
18 *Antitrust Litigation*, 619 F. Supp. 2d 1062, 1072 (D. Nev. 2008) (same); *Quezada v.*
19 *Loan Center of Cal., Inc.*, 2009 WL 5113506 at *2, fn 2 (E.D. Cal.). In other words, a
20 named plaintiff must show that he "personally" has been injured by the defendant –
21 "not that injury has been suffered by other, unidentified members of the class to which
22 they belong and which they purport to represent." *Cady v. Anthem Blue Cross Life and*
23 *Health Ins. Co.*, 583 F. Supp. 2d at 1106 (quoting *Simon v. E. Ky. Welfare Rights Org.*,
24 426 U.S. 26, 40 n. 20 (1976) (quoting *Warth v. Seldin*, 422 U.S. 490, 502 (1975)). "If
25 the named plaintiff fails to establish standing, he may not seek relief on behalf of
26 himself or any other member of the class." *Id.* (citing *Henry v. Circus Circus Casinos,*
27 *Inc.*, 223 F.R.D. at 543 (quoting *Nelsen v. King County*, 895 F. 2d 1248, 1250 (9th Cir.

1 1990)). For these reasons, Plaintiff does not have standing on behalf of himself or a
 2 putative class to assert claims against Oversee.

3 Nor does Plaintiff have standing to assert claims against Oversee simply by
 4 virtue of its corporate relationship with SnapNames. "It is well-established that a
 5 parent-subsidary relationship alone is an insufficient basis on which to hold a parent
 6 liable for a subsidiary's actions." *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939,
 7 944 (S.D. Cal. 2007); *see also United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998)
 8 ("It is a general principle of corporate law deeply 'ingrained in our economic and legal
 9 systems' that a parent corporation . . . is not liable for the acts of its subsidiaries.")
 10 (citations omitted); *accord Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements*
 11 *Ltd.*, 328 F. 3d 1122, 1134 (9th Cir. 2003).

12 For the foregoing reasons, therefore, all of Plaintiff's claims against Oversee
 13 must be dismissed as a matter of law.

14
 15 B. Plaintiff Fails to State a Claim Under the California Auction Act.

16
 17 The California Auction Act does not apply to Defendants' conduct as a matter of
 18 law. The California Auction Act, California Civil Code section 1812.601 *et seq.*,
 19 regulates certain conduct by "auction companies" as defined by the Act. *See* Cal. Civ.
 20 Code § 1812.602 *et seq.* But "[t]he Auction Act was enacted before Internet 'auctions'
 21 . . . were in vogue," and simply does not apply to the conduct of internet auction
 22 companies like SnapNames. *See Ewert v. eBay, Inc.*, 2008 WL 906162 at *1 (N.D.
 23 Cal.).

24 Indeed, this issue was recently addressed by the Court in *Ewert v. eBay, Inc.*,
 25 2008 WL 906162 (N.D. Cal.), where the defendant was eBay, Inc., an online auction
 26 company that runs auctions in a method similar to SnapNames' auctions. *See id.*
 27 There, the Court granted defendant's motion to dismiss, holding that the California
 28 Auction Act did not apply to defendant's conduct as a matter of law because, as here,

1 defendant was neither an “auctioneer” nor an “auction company” as defined by the
2 California Auction Act, nor did it conduct “auctions” as defined by the Act.² *Id.* The
3 court explained: “Plaintiff’s attempt to place eBay’s conduct within the scope of the
4 Auction Act is like trying to put a round peg in a square hole. The Auction Act was
5 enacted before Internet ‘auctions’ like eBay’s and other similar business platforms
6 were in vogue.” *Id.*

7 Likewise, here, while Plaintiff alleges that Defendants “are both ‘auction
8 companies’ as defined by Cal. Civ. Code § 1812.601(c)” (Complaint, ¶ 49), that
9 allegation fails by simple reference to the definitions provided in the California
10 Auction Act itself. Section 1812.601(c) defines an “auction company” as a person who
11 carries out “auction” sales.³ *Id.* An “auction” is defined as a sales transaction between
12 an “auctioneer and the members of his or her audience, which exchanges consist of a
13 series of invitations for offers . . . and culminate in the acceptance by the auctioneer of
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22 ² The Court also noted that reference to other provisions of the Act negate any
23 suggestion that it could apply to eBay’s conduct, as such provisions would be rendered
24 “nonsensical.” *Ewert v. eBay, Inc.*, 2008 WL 906162 at *1. One such example is the
25 “requirement of the posting of an 18 x 24 inch sign at the entrance to the auction.” *Id.*

26 ³ Section 1812.601(c) states in full: “‘Auction company’ means any person who
27 arranges, manages, sponsors, advertises, accounts for the proceeds of, or carries out
28 auction sales at locations, including, but not limited to, any fixed location, including an
auction barn, gallery place of business, sale barn, sale yard, sale pavilion, and the
contiguous surroundings of each.” Cal. Civ. Code. § 1812.601(c).

1 the highest or most favorable offer”⁴ Cal. Civ. Code § 1812.601(b). An
 2 “auctioneer” is “any individual who is engaged in . . . the calling for, the recognition
 3 of, and the acceptance of, offers for the purchase of good at an auction.”⁵ Cal. Civ.
 4 Code § 1812.601(d).

5 Thus, Defendants, like eBay in *Ewert v. eBay, Inc.*: (1) are not “auctioneers” as
 6 defined by the Act because they are not “individuals,” (2) do not conduct “auctions” as
 7 defined by the Act because a sale does not “culminate” by acceptance by the auctioneer
 8 of the highest offer but, rather, at the expiration of the fixed period of time; (3) do not
 9 conduct “auctions” as defined by the Act because they do not have an auctioneer who
 10 makes a series of “calls for” offers; and (4) are not “auction companies” because they
 11 do not make “auction sales” as defined by the Act. *See* Cal. Civ. Code § 1812.601(b)-
 12 (d); *Ewert v. eBay, Inc.*, 2008 WL 906162 at *1.

13 Accordingly, Defendants do not fall within the category of persons regulated by
 14 the California Auction Act, and Plaintiff thus fails to state a claim against them for its
 15 violation.

17
 18 ⁴ Section 1812.601(b) states in full: “‘Auction’ means a sale transaction conducted by
 19 means of oral or written exchanges, which include exchanges made in person or
 20 through electronic media, between an auctioneer and the members of his or her
 21 audience, which exchanges consist of a series of invitations for offers for the purchase
 22 of goods made by the auctioneer and offers to purchase made by members of the
 23 audience and culminate in the acceptance by the auctioneer of the highest or most
 24 favorable offer made by a member of the participating audience. However, auction
 25 does not include either of the following: (1) A wholesale motor vehicle auction subject
 26 to regulation by the Department of Motor Vehicles. (2) A sale of real estate or a sale in
 27 any sequence of real estate with personal property or fixtures or both in a unified sale
 28 pursuant to subparagraph (B) of paragraph (1) of subdivision (a) of Section 9604 of the
 Commercial Code.” Cal. Civ. Code. § 1812.601(b).

⁵ Section 1812.601(d) states in full: “‘Auctioneer’ means any individual who is
 engaged in, or who by advertising or otherwise holds himself or herself out as being
 available to engage in, the calling for, the recognition of, and the acceptance of, offers
 for the purchase of goods at an auction.” Cal. Civ. Code. § 1812.601(d).

1 C. Plaintiff Fails to State a Claim for Breach of Fiduciary Duty.

2
3 Plaintiff purports to state a claim for breach of fiduciary duty but has failed to
4 plead any facts demonstrating a fiduciary relationship between Plaintiff and
5 Defendants, and, thus, the claim fails as a matter of law. Indeed, while Plaintiff
6 conclusorily alleges “Defendant held positions of trust and confidence with Plaintiff”
7 (Complaint, ¶77), Plaintiff alleges facts that disclose no more than an arm’s length
8 transaction between the Plaintiff and SnapNames. Indeed, Plaintiff alleges only that he
9 participated in a SnapNames auction, and “conducted a transaction . . . when he
10 purchased an Internet domain name.” Complaint, ¶¶ 26-29, 31, 83.

11 These allegations are insufficient to impose any fiduciary obligation upon
12 Defendants. “[B]efore a person can be charged with a fiduciary obligation, he must
13 either knowingly undertake to act on behalf and for the benefit of another, or must
14 enter into a relationship which imposes that undertaking as a matter of law.” *Sonoma*
15 *Foods, Inc. v. Sonoma Cheese Factory, Inc.*, 634 F. Supp. 2d 1009, 1020 (N.D. Cal.
16 2007) (quoting *Committee On Children's Television, Inc. v. General Foods Corp.*, 35
17 Cal.3d 197, 221 (1983)). “Although parties may create fiduciary relationships by
18 contract, ‘[m]ere contractual relationships, without more, do not give rise to fiduciary
19 relationships.’” *Sonoma Foods, Inc. v. Sonoma Cheese Factory, Inc.*, 634 F. Supp. 2d
20 at 1021 (quoting *Parrish v. Nat'l Football League Players Inc.*, 2007 WL 1624601, *4
21 (N.D. Cal. June 4, 2007) (citing *Oakland Raiders v. Nat'l Football League*, 131 Cal.
22 App. 4th 621, 633-634 (2005))). Thus, where a plaintiff does not plead any facts that
23 demonstrate that the defendant **agreed** to a fiduciary relationship as part of a
24 transaction, a claim for breach of fiduciary duty must be dismissed as a matter of law.
25 *See Sonoma Foods, Inc. v. Sonoma Cheese Factory, Inc.*, 634 F.Supp.2d at 1021
26 (dismissing breach of fiduciary duty claim where plaintiff failed to plead any facts that
27 would give rise to a fiduciary duty); *see also Headlands Reserve LLC v. Center for*
28 *Natural Lands Management*, 523 F. Supp. 2d 1113, 1131 (C.D. Cal. 2007) (no

1 fiduciary relationship where litigants had been parties “in an arm’s length
2 transaction”); *Garcia v. Coleman*, 2008 WL 4166854 (N.D. Cal.) (same).

3 Accordingly, because Plaintiffs has not any pled any facts that demonstrate
4 Defendants agreed in the alleged transaction at issue to undertake a fiduciary
5 relationship, Plaintiff fails to state claim for breach of fiduciary duty.⁶

6
7 D. Plaintiff Fails to State a Claim for Either Statutory or Common Law
8 Fraudulent Concealment.
9

10 Plaintiff purports to state both a common law fraudulent concealment claim, and
11 a statutory fraudulent concealment claim based upon alleged violations of California
12 Civil Code sections 1710(3), 1572(3), and 1573(2). Complaint, ¶¶ 61-69, 81-88.

13 “[T]he elements of an action for fraud and deceit based on concealment are: (1) the
14 defendant must have concealed or suppressed a material fact, (2) the defendant must
15 have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have
16 intentionally concealed or suppressed the fact with the intent to defraud the plaintiff,
17 (4) the plaintiff must have been unaware of the fact and would not have acted as he did
18 if he had known of the concealed or suppressed fact, and (5) as a result of the
19 concealment or suppression of the fact, the plaintiff must have sustained damage.”

20 *Blickman Turkus LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th 858, 868
21 (2008) (quoting *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th
22 603, 612-613 (1992); *Lovejoy v. AT&T Corp.*, 119 Cal. App. 4th 151, 157-158 (2004)).
23 Here, Plaintiff has failed to allege facts sufficient to establish any “duty to disclose,”
24 and thus cannot state a claim for concealment. *See Buckland v. Threshold Enterprises,*
25 *Ltd.*, 155 Cal. App. 4th 798, 807 (2007) (“to establish fraud through nondisclosure or
26 concealment of facts, it is necessary to show that the defendant ‘was under a legal duty
27 to disclose them’”) (quoting *Lingsch v. Savage*, 213 Cal. App. 2d 729, 735 (1963)).

28 ⁶ Nor has Plaintiff alleged any other basis for a fiduciary duty.

1 While Plaintiff alleges “Defendant had a fiduciary duty to Plaintiff” and a duty
2 of disclosure “under Cal. Civ. Code 1812.608(h)(2)” (Complaint, ¶ 85), those
3 allegations fail as a matter of law. For the reasons set forth above, Plaintiff has not
4 adequately alleged any fiduciary relationship between Plaintiff and Defendants, and
5 thus Plaintiff’s concealment claim cannot be premised upon any purported fiduciary
6 duty. *See Kudokas v. Balkus*, 26 Cal. App. 3d 744,750-751 (1972) (no fiduciary or
7 confidential relationship existed upon which a concealment claim could be predicated,
8 where parties were merely participants in an “arm’s length transaction”); *Garcia v.*
9 *Coleman*, 2008 WL 4166854 (N.D. Cal.) (same).

10 Similarly, for the reasons set forth, above, California Civil Code section
11 1812.608(h)(2), which is part of the California Auction Act, has no application here,
12 and thus cannot be the basis for any “duty to disclose.” Even if Section 1812.608(h)(2)
13 were applicable here (which it is not), it does not purport to impose any sort of “duty
14 to disclose” on any party. Section 1812.608(h)(2) states that it is a violation of the Act
15 to cause or allow an “owner, cosignor, or agent thereof” to bid on an item without
16 disclosing that he has reserved the right to so bid. Cal. Civ. Code § 1812.608(h)(2). In
17 other words, it merely defines a violation but does not impose any “duty.” And, in any
18 event, Plaintiff makes no allegation that any “owner, cosignor, or agent thereof”
19 “reserved” any right to bid that might have been disclosed here. For the foregoing
20 reasons, therefore, Section 1812.608(h)(2) imposed no “duty to disclose” upon which
21 Plaintiff can premise his claims for fraudulent concealment.

22 Because Plaintiff has failed to adequately allege the essential element of a duty
23 to disclose, Plaintiff’s claims for fraudulent concealment must be dismissed as a matter
24 of law. *See Blickman Turkus LP v. MF Downtown Sunnyvale, LLC*, 162 Cal. App. 4th
25 at 883-884 (concealment claim dismissed where plaintiff failed “to adequately allege a
26 duty of disclosure”).

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E. Plaintiff Fails to State a Claim for Violation of Business & Professions Code Section 17200 to the Extent the Claim is Premised upon Alleged Statutory Violations or a Concealment.

Plaintiff purports to allege violations of California Business & Professions Code section 17200 based upon purported “unlawful, unfair, and/or fraudulent business practices” by Defendants. Complaint, ¶ 70.

Plaintiff cannot state a claim under the “unlawful” prong of Section 17200 because Plaintiff fails to state a claim for the violation of any other law. “Under its ‘unlawful’ prong, ‘the UCL borrows violations of other laws . . . and makes those unlawful practices actionable under the UCL.’” *Berryman v. Merit Property Managaement, Inc.*, 152 Cal. App. 4th 1544, 1554 (2007) (quoting *Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1505 (1999)). “Thus, **a violation of another law is a predicate for stating a cause of action under the UCL’s unlawful prong.**” *Id.* (emphasis added).

Here, the only purported predicate violations alleged by Plaintiff are violations of the California Auction Act and statutory fraudulent concealment. Complaint, ¶ 72. But, for the reasons set forth, above, Plaintiff fails to state claims for the violation of those statutes. Under such circumstances, where a plaintiff fails to allege a predicate violation of an underlying statute, a Section 17200 claim based upon an “unlawful” business practice is “necessarily” defeated. *Lazar v. Hertz Corp.*, 69 Cal. App. 4th at 1507 (plaintiff failed to state claim under “unlawful” prong of Section 17200, where plaintiff failed to plead facts to support its allegations of statutory violations); *accord Lopez v. Washington Mutual Bank*, 302 F.3d 900, 907 (9th Cir. 2002) (same); *Berryman v. Merit Property Managaement, Inc.*, 152 Cal. App. 4th at 1554 (same).

Nor, of course, can Plaintiff state a claim under the “unfair” prong of Section 17200 to the extent such a claim is based upon the same alleged statutory violations. *See* Complaint, ¶ 73(c). A plaintiff cannot state a claim under the “unfair” prong of

1 Section 17200 by “bootstrap[ing]” a failed claim onto it. *Berryman v. Merit Property*
2 *Management, Inc.*, 152 Cal. App. 4th at 1555 (plaintiff failed to state claim under
3 “unfair” prong of Section 17200 by “bootstrap[ing]” a claim “they are not allowed to
4 bring” onto a Section 17200 claim). Again, for the reasons set forth above, Plaintiff
5 fails to state claims for violation of the California Auction Act and statutory fraudulent
6 concealment. Accordingly, Plaintiff fails to state a claim for violation of Section
7 17200 based on any alleged “unfair” business practices predicated on the violation of
8 those statutes. *See id.*

9 Additionally, Plaintiff cannot state any claim under Section 17200’s “fraudulent”
10 prong based upon any alleged concealment. While Plaintiff alleges that Defendants
11 engaged in fraudulent business practices within the meaning of Section 17200 by, *inter*
12 *alia*, “failing to disclose” certain facts (Complaint, ¶ 74(b)), those allegations fail as a
13 matter of law. Though a Section 17200 violation may be shown by demonstrating at a
14 minimum that “members of the public are likely to be deceived,” a court cannot find
15 that “a failure to disclose a fact one has no affirmative duty to disclose is “likely to
16 deceive” anyone within the meaning of [Section 17200].” *Berryman v. Merit*
17 *Property Managaement, Inc.*, 152 Cal. App. 4th at 1556-1557 (quoting *Daugherty v.*
18 *American Honda Motor Co., Inc.*, 144 Cal. App. 4th 824, 839 (2006)). Accordingly,
19 “absent a duty to disclose, the failure to do so does not support a claim under the
20 fraudulent prong of [Section 17200].” *Id.* at 1557. Because, for the reasons set forth in
21 detail, above, Plaintiff has failed to allege any duty of disclosure here, Plaintiff’s claim
22 under the “fraudulent” prong of Section 17200 must fail to the extent it is predicated
23 upon a purported concealment. *See id.* (plaintiff failed to state claim under
24 “fraudulent” prong of Section 17200 based upon an alleged concealment, where
25 plaintiff failed to allege any affirmative duty to disclose).

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Conclusion

All of Plaintiff's claims against Overseer must be dismissed because Plaintiff does not have standing to assert any claims against Overseer. Additionally Plaintiff's claims for violation of the California Auction Act, breach of fiduciary duty, and fraudulent concealment – both statutory and common law – must be dismissed for failure to allege facts sufficient to state any claim. Likewise, Plaintiff has failed to state a claim under Section 17200 to the extent the claim purports to be predicated upon any alleged “unlawful” conduct, any alleged “unfair” conduct based upon alleged statutory violations, and any alleged “fraudulent” conduct based upon any alleged concealment. For all of the reasons presented in this motion, Defendants respectfully request this Court grant their Motion to Dismiss with prejudice pursuant to Rule 12(b)(6).

Dated: January 11, 2010

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